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THE SUPREME COURT OF CANADA AND CANADIAN FEDERALISM*

By PAUL C. WEILER**

Mr. Justice Hughes of the United States Supreme Court once remarked that "We are under a Constitution, but the Constitution is what the judges say it is."¹ This is almost a truism in American constitutional law and we have it on the authority of our own Mr. Justice Hall that the situation is the same in Canada.² I believe that the statement is essentially correct and I certainly approve of this frank recognition by judges of their own responsibility for the constitutional decisions they are making. What I would like to do today, though, is to delve deeper into the legal situation which is reflected in this remark and ask some of the questions it suggests to the student of the courts, if not to the constitutional lawyers. What is there about constitutional law which makes the judicial responsibility so predominant? Should such a constitutional role lead to a redesigning of the Supreme Court along the lines of a specialized "constitutional court?" Finally, and most important, do we really want, or do we really need, in a federal system, the kind of constitutional umpire whose performance is, I think, aptly conveyed by Hughes J.'s comment?

I shall begin my analysis by a sketch of a case study — our recent constitutional cause célèbre arising out of the "chicken and egg war".³ This was primarily an engagement fought by the bordering provinces of Ontario and Quebec. Ontario farmers produced an abundance of cheap eggs and Quebec farmers an abundance of cheap chickens. The surplus producers were naturally interested in the market of the consumers in the neighbouring jurisdiction. Equally naturally, though, the somewhat less efficient producers of each product were not so enamoured of competition within their own bailiwick. When they went to their own government for protection, the result was the creation of marketing schemes under enabling legislation. These provided for the controlled marketing, at fixed prices, of *all* the chickens sold

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¹ Quoted from Pusey, *Hughes*, at 204.

² In an unpublished lecture *Law Reform and the Judiciary's Role* given at the Osgoode Hall Law School on September 29, 1971.

³ For the political background to the court's decision I have relied essentially on newspaper accounts throughout 1971. One of the best such stories was in the *Financial Post* of May 29, 1971, at 1 and 6. The Supreme Court of Canada decision is reported under the name *The Attorney-General for Manitoba v. The Manitoba Egg and Poultry Association*, [1971] S.C.R. 689, affirming the Manitoba Court of Appeal decision reported at (1971), 18 D.L.R. (3d) 326.

in Ontario and *all* the eggs in Quebec, whatever the source. Unfortunately, it appears that the marketing boards became a little greedy and went even further to give undue preference in marketing to those products coming from within the province. Even worse, this had adverse effects on producers in other provinces such as Manitoba, which, as a consistent producer of agricultural surpluses, was the classic innocent and injured bystander in the "chicken and egg war".

On the surface, I find it rather hard to see what the courts have to contribute to the resolution of this essentially political and economic conflict. There certainly was ample scope for bargaining and negotiating terms of settlement which might offer at least something to everyone. One could understand that the federal government, which represented producers and consumers from all affected jurisdictions, might have been an appropriate arbiter. Unfortunately, earlier judicial decisions of the twenties and the thirties had themselves created the very institutional gaps which fostered such interprovincial marketing conflicts.⁴ At this very time though, the federal government was attempting to shepherd through Parliament a new Farm Products Marketing Act which would attempt to ameliorate these deficiencies through a complicated process of inter-administrative delegation.⁵ Though there appeared to be substantial consensus in favour of the general scheme of the Bill by both federal and provincial ministers of agriculture, it was being delayed by opposition members who largely represented western farming interests. In the interim, the federal government had carefully resisted many calls to refer the "political" dispute to the Supreme Court of Canada for immediate "legal" resolution.

Unfortunately, Manitoba, which was understandably loath to wait for a political decision on the larger questions, devised a scheme for circumventing this reluctance of the federal Justice Minister. This provincial government manufactured a controversy by initiating, through a proposed Order-in-Council, a carbon copy of the Quebec scheme, providing for Manitoba control of the marketing of extra-provincial eggs in Manitoba. It then referred these regulations to the Manitoba Court of Appeal for a decision about their constitutionality, under its own provincial reference legislation. When the Manitoba Court of Appeal decision was unfavourable as to the constitutional validity of the scheme, the Manitoba government was entitled as of right to appeal this "loss" to the Supreme Court of Canada. In this way, it could achieve a binding decision as to all such schemes which would be authoritative in all the provinces.

⁴The important decisions were *Eastern Terminal Elevator v. The King*, [1925] S.C.R. 434, *Lawson v. Interior Fruit Committee*, [1931] A.C. 357 and *Attorney-General for B.C. v. Attorney-General for Canada*, [1937] A.C. 377. Other significant decisions limiting the trade and commerce power in related areas were *In Re Board of Commerce Act*, [1922] A.C. 191 and *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396. The sad story is told in A. Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963), and R. E. Johnston, *The Effect of Judicial Review on Federal-State Relations in Australia, Canada and the United States* (Baton Rouge: Louisiana State University Press, 1969), ch. VI.

⁵Farm Products Marketing Agencies Act, S.C. 1971, c. F-65, previously Bill C-176, 28 Parl., 3rd Sess.

Questions might be asked about the propriety of this apparent subversion of the adversary process when the Manitoba government purported to argue for, and then appeal on behalf of, laws which it was proposing to enact for the sole purpose of having them declared unconstitutional. Of more general and recurring concern, though, are the deficiencies of the Reference device itself which the Manitoba government was attempting to utilize in order to get this political and economic dispute settled.⁶ If there are any two characteristics of the judicial process which give it some qualifications to resolve constitutional issues, they are that the disputes arise in a concrete factual setting and are adjudicated by a neutral impartial arbiter. Because a very specific fact-situation triggers the litigation which appeals to a court for a constitutional ruling, the judge has the benefit of being able to focus on the real-life implications of the decision he is making and thus to carefully tailor and limit the reach of the determination as he sees fit. Moreover, the neutrality of the judge is preserved by an adversary process which requires the interested parties to bring the relevant factual background before the Court, depicted in as favourable a light as possible from each point of view.

In the Manitoba Reference, both of these advantages of adjudication were dissipated. There was no concrete focus around which the reasoning of the court could be organized, nor was the factual economic background to the statute depicted. The Manitoba government conspicuously omitted to set out in the Reference the relevant economic background which might well have supported the reasonability of provincial action in the area. Ontario and Quebec, which were vitally interested in sustaining this kind of legislation, did not have an opportunity to present this factual support. Indeed, the questions which the Manitoba government posed to the Court did not focus on what appears to have been the real character of the dispute — the discriminatory application of provincial marketing quotas against out-of-province producers — and instead required the Court to make a blanket decision about the legality of any such marketing scheme, no matter how favourably it might be applied to extra-provincial products. In my opinion, the most sensible response would have been a forthright refusal to answer the questions on the grounds that the dispute was not appropriate for judicial resolution. One senses that Mr. Justice Laskin, who was especially critical of the abstract character of the Reference, was drawn in this direction, but eventually the legal mystique surrounding issues of federalism overcame his reluctance. The majority opinion proceeded blithely ahead, without any apparent concern for the complex and inter-related political or economic interests involved in the dispute, and the Court gave Manitoba the broad legal weapon it was hoping for.

Are there any inadequacies in the substantive reasoning and results of the Court which may reflect some of these procedural deficiencies? A casual reading of the opinion certainly indicates the truth of Hughes' dictum that "the constitution is what the judges say it is". In the first place, the Supreme Court is attempting to work out a distinction between regulation of inter-provincial and intra-provincial trade. However, this is a purely judicial gloss

⁶The law and policy relating to the Reference device in Canada is canvassed in B. Strayer, *Judicial Review of Legislation in Canada* (Toronto: U. of T. Press, 1968), ch. 7.

on the text of the B.N.A. Act, which has become constitutional dogma with little real assessment of the reasons for it. It began with *Citizens Insurance v. Parsons*,⁷ a Privy Council decision which upheld the validity of fairly innocuous provincial legislation regulating the terms of insurance contracts. In order to do so, the Court excluded provincial intervention from the economy only when it amounted to "regulation of trade in matters of inter-provincial concern". Soon this formula became constitutional dogma for the converse problem—determining the ambit of valid dominion legislation. Because there has never been any real assessment of the reasons *why* we should have such a judge-made allocation of legislative authority, it is not surprising that the courts have never discovered *how* to apply it in anything but a wooden and legalistic way.

The underlying functional problem is that consumers of farm products, who are making purchases through a national currency and credit system, cannot meaningfully be regulated by a legislative body which has jurisdiction over some portion only of the undifferentiated products which are being marketed to them. If the federal government alone can control the marketing of extra-provincial products or trade and the provincial government alone can control intra-provincial products or transactions, then there will have to be substantial identity in the content of co-ordinated legislation in order that the regulatory goals of either can be achieved. Otherwise the supply of unregulated goods will frustrate the orderly marketing and price supports which are the major thrust of current farm policy. However, the attainment of co-operation always faces the obstacle of possible federal disinterest in a relatively localized problem, or a parochial local veto of legislation desired by the federal government and a majority of the provinces. Hence, the requirement of co-operative action is always risky, time-consuming, and in the interests of those who do not want to be regulated, and who win from a governmental decision not to intervene, whether it comes on the merits or not.

This is the economic background to the various statutory schemes which came up for constitutional review in the light of this concept of "inter-provincial trade". A lengthy series of precedents sustained the constitutionality of non-discriminatory, provincial schemes for the orderly marketing of products within their borders, whatever the source of destination. In *Shannon v. Lower Mainland Dairy Products Board*,⁸ the Privy Council upheld compulsory marketing of milk through provincial boards situate in the province, and considered it quite unimportant that some of this milk was produced outside the province. Shortly afterwards, in *Home Oil Distributors Ltd. v. A.-G. British Columbia*,⁹ the Supreme Court upheld provincial fixing of minimum and maximum prices of gasoline and fuel oil in reliance on *Shannon*. It was clear from extrinsic evidence that this legislation was aimed at extra-provincial (in fact foreign) producers who were dumping surplus fuel oil in B.C. at such low prices that it was destructive to the B.C. coal industry, and who were recovering their losses from extortionate prices charged

⁷ [1881] 7 A.C. 96 at 113.

⁸ [1938] A.C. 708 at 717.

⁹ [1940] S.C.R. 444.

for gasoline, for which there was no local alternative. The Court simply applied the formula that the regulation applied only to products once they were inside the province and said that if the plaintiffs "desire to carry on their business in the Province of British Columbia, they must comply with provincial laws in common with all provincial and independent dealers in the same commodities". In the face of these two precedents, it would seem difficult indeed for the Supreme Court to hold the Manitoba scheme invalid under existing law.

However, some retreat from the very wide compass given to provincial powers might have been seen in the *Ontario Farm Products Reference*¹⁰ which dealt with the opposite side of the marketing coin — provincial competence over locally-produced products destined for outside the province. The Court for the first time appeared to recognize that there are few, if any, marketing transactions which cannot be described, at least abstractly, as taking place within one province, while there are few intra-provincial transactions which do not have ramifications outside the province. Some judges tried to lay down certain dividing lines as to when a product could be said to be in inter-provincial trade and thus outside provincial control. The important factor appeared to be whether the products were intended to be sold, directly or indirectly (i.e., after processing) to consumers within that province. Unfortunately, the very abstract character of this Reference¹¹ deprived these efforts of any real significance, as was indicated by the next case, *Carnation Company Ltd. v. The Quebec Agricultural Marketing Board*¹² — involving real facts and a concrete dispute.

In the *Carnation* case, a Canadian incorporated company with its head office in Toronto, operated in Quebec both a receiving station for milk and a processing plant. It bought raw milk from about 2,000 farmers in the relevant area, sent most of it to the plant to be processed into evaporated milk, and skimmed some of the milk and sent it to be processed in an Ontario plant. The major consumer market for the evaporated milk was outside Quebec. Under provincial marketing legislation, a majority of area milk producers organized a marketing plan which regulated all sales of raw milk to Carnation Co., with provision for government arbitration of price in case of non-agreement. It appeared as a result that Carnation had to pay a significantly greater price for raw milk than other purchasers from the same area and eventually Carnation objected to the constitutionality of an arbitration award. However, the Supreme Court, in an opinion written by Martland J., upheld the provincial scheme on the theory that each transaction and each regulation must be examined in relation to its own facts:

In the present case, the orders under question were not, in my opinion, directed at the regulation of inter-provincial trade. They did not purport directly to control or to restrict such trade. There was no evidence that, in fact, they did control or restrict it. The most that can be said of them is that they had some effect upon the cost of losing business in Quebec of a company engaged in inter-provincial trade, and that, by itself, is not sufficient to make them invalid.¹³

¹⁰ [1957] S.C.R. 198.

¹¹ See discussion in Strayer, *supra*, note 6 at 178-79.

¹² [1968] S.C.R. 238 at 253.

¹³ *Id.*, at 254.

In the face of this decision, I suggest that it would be very difficult to invalidate the proposed Manitoba Egg scheme and, in order to do so, the Court would have to make and justify a very substantial change in the direction of Canadian constitutional law. Of course, the two older cases, *Shannon* and *Home Oil* were directly on point and firmly in favour of provincial jurisdiction. Whatever hints to the contrary we might have seen in the *Ontario Farm Products Reference*, dealing with an analogous situation, seemed put to rest by the *Carnation* case. Yet the Court, without a hint that it was doing any more than following a long, unbroken line of decisions, turned around and held the Manitoba scheme invalid. The majority opinion of the Court was again written by Mr. Justice Martland, and the sum total of his reasoning to this conclusion is contained in the following passage:

It is my opinion that the plan now in issue not only affects inter-provincial trade in eggs, but that it aims at the regulation of such trade. It is an essential part of this scheme, the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs, specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between provinces as such. Because of that, it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce.¹⁴

In my opinion, this argument is completely question-begging, as a response to the legal authority even if *Carnation* decided less than three years before (let alone the older but more direct precedents of *Shannon* and *Home Oil*). No doubt there are factual distinctions between the two marketing schemes, but I do not believe that there are meaningful economic differences relevant to the central legal issue: should one province have the power to control agricultural marketing inside its boundaries when this necessarily affects or "concerns" the interests of citizens in other provinces? I will indicate my reasons for this statement shortly but I should first point out that even if I am wrong in this judgment, there is not one sentence in the majority opinion which purports to show *why* one scheme is valid but the other is not. Instead, we are given only labels — "affects" inter-provincial trade or "aims at the regulation" of such trade. These the individual judges apply in some mysterious fashion to produce a result which they tell us is the law, or at least the law for the time being.

What is the functional or economic significance of the scheme in the *Manitoba Egg Reference* and how does it compare to that in *Carnation*? Manitoba producers were authorized to create marketing boards composed of people elected by them and charged with achieving the most advantageous marketing for their product. To this end the boards were given powers to market all eggs sold in the province, and to require the grading, packing and marketing of all such eggs at a station, the operation of which is under the control of the board. All eggs coming from outside the province were subject to the scheme and the place of origin of such eggs was to be marked on the container. No doubt the major problem in this legislation was that it could be administered in a discriminatory fashion (and, as I have said, apparently was so operated in other provinces.) If extra-provincial eggs were not given a fair share of marketing quotas, and were kept out of provincial markets

¹⁴ *Supra*, note 3 at 703.

until provincial eggs were sold, this would be an obvious reason for invalidating the legislation in operation.¹⁵ However, actual discrimination was not the assumption on which the Reference was made, argued, and decided and the dangerous character of the decision is that it seems to bar subjection of extra-provincial products to even a fairly-administered provincial regulatory scheme.¹⁶

The economic purpose of this kind of marketing legislation is protection of the markets and prices of Manitoba producers at the expense of Manitoba consumers. In order to achieve this result of price supports and orderly marketing in an undifferentiated market for eggs, it is necessary to subject producers from other provinces to the same limitations in dealing with Manitoba distributors. On the other hand, the purpose of the legislation in *Carnation* is to protect Quebec producers, at the expense of mainly non-Quebec consumers, without any limitation on non-Quebec producers. In the final analysis, the only difference is that in *Carnation* the wholesale marketing and prices of Quebec milk are controlled by Quebec law — whether it is destined for inside or outside Quebec — while in the *Manitoba Egg* case, all eggs sold in Manitoba are to be marketed and priced under Manitoba controls, whether they come from within or without Manitoba. Yet Martland J. decided that, “on its own facts”, the Manitoba legislation is *in relation to* trade and commerce, as well as *affecting* it, and thus unconstitutional. As to the *Carnation* scheme, again, “on its own facts” he said it merely had some effect on inter-provincial trade, and was valid. If there is a difference, which is relevant to the federal division of legislative power, it is not apparent to me, and certainly not adverted to on the face of the opinion.

Laskin, J.’s opinion is much more sophisticated, especially in recognizing the difficulties faced in trying to answer such a question of constitutionality on a Reference with no supporting factual or economic data. However, unfortunately, he does not appear to consider the possibility that, in such a situation, discretion may be the better part of valour. He says that the “proposed scheme has as a direct object the regulation of the importation of eggs, and it is not saved by the fact that the local market is under the same regime”.¹⁷ His only practical reason for holding this to be invalid is that it denies “one of the objects of Confederation . . . namely to form an economic unit of the whole of Canada.” Unfortunately, he does not tell us why this is the case for this kind of legislation and not so in *Carnation*, and, in any event, what are the evils in a non-discriminatory provincial scheme for controlled marketing and price supports for all eggs sold in the province, whatever their source.

The functional problem which the Court is required to face in the case is the degree of latitude which a province should be allowed in subjecting the

¹⁵ I might add that section 121 of the B.N.A. Act would likely make this unconstitutional, even for the federal government. See the discussion by Rand, J. in *Murphy v. C.P.R.*, [1958] S.C.R. 626 at 638 ff.

¹⁶ However, Mr. Justice Pigeon, in a cryptic concurring opinion (at 723), agreed with the majority conclusion only for the explicit reason that the scheme enabled the Board to use quotas to give preference to sale of local eggs, even if this might mean a total prohibition on the sale of out-of-province eggs.

¹⁷ *Supra*, note 3 at 717.

business sector of our society to regulation within its borders. As a matter of plain, economic facts, the inter-dependent nature of business activity in this country is such that almost all provincial regulations will have ramifications on citizens and enterprises outside the country, whether or not the legal rule technically applies only to purely intra-provincial trade or transactions. Moreover, the citizens of these provinces, who are so affected by these regulatory decisions, have no real say in the election of the representative governments which make them. Hence the arguments which can be made for judicial *laissez-faire* with respect to democratically-elected parliaments do not have the same weight as in many of the other constitutional areas decided by the Court.

Interestingly enough, although our Supreme Court has never looked for illumination in American cases, since 1949 there has been a very sophisticated debate about the proper judicial role in controlling state-enacted "burdens" on inter-state commerce.¹⁸ One position — that of Jackson — takes the view that if a state enacts a law which imposes a significant burden on commerce within the national free-trade economic unit, it should be struck down. Black, at the other pole, holds that if the state has a reasonable interest of its own in the object of the regulation, and the law does not attempt to discriminate against out-of-state business as such, it should be upheld. An interim position — formulated by Stone and probably reflective of the majority view in the Court and among academic commentators — holds that the Court should balance the legitimate benefits achieved by the states from the regulations against the burdens inflicted on inter-state commerce and only invalidate the law if the latter exceeds the former.

This brief statement of the opposing positions does not of course convey a sense of the detailed and sophisticated examination undertaken by the U.S. Supreme Court in making these inquiries. It is clear, though, from a comparison of the reasoning and results in *Carnation* and the *Manitoba Reference*, that our Court is either incapable of, or unwilling to perform the same function. If the Court had taken Black's approach, I believe both schemes would be held valid (at least on their face), while if they took Jackson's approach, both would be held invalid. If Stone's intermediate view was adopted, the Court would have had to weigh the competing interests of the legislating province in the respective schemes and those of the nation in the free flow of a national fair market. What we received though was only a judicial *ipse dixit* which may have authoritatively resolved the dispute — in the way Manitoba wanted — but did so with no supporting reasoning.

There are some observers who will not be troubled by this, and will believe that what the Court says is law and must be followed, and that is the end of that. Unfortunately others, especially those adversely affected by this "law", will ask why they should unquestioningly accept the initiative judgments of the Court. Ontario and Quebec will simply say that they believe their legislation is somewhat different from that involved in the *Manitoba*

¹⁸ A recent book by P. R. Benson, *The Supreme Court and the Commerce Clause* (New York: Dunellen, 1970) has an excellent discussion of the different positions in Chapter 7. Perhaps the leading case illustrating the alternative views is *Southern Pacific v. Arizona ex rel Sullivan* (1945), 325 U.S. 761.

Reference and there is no principle or reasoning in the latter case which can indicate whether or not these distinctions are specious. In any event, it seems that shortly afterwards the affected governments met and engaged in some serious bargaining which was directed toward the real conflicts and problems in the area. This was to be expected because it is hard to see how the "winner take all" kind of judicial decision could be an acceptable basis for resolving a very complex problem involving not only a conflict between different groups of producers, but an equally vital conflict between producers and consumers who vote in the same province. The most intriguing comment made just before the meeting of the ministers of agriculture was that they were all agreed then on just one thing — that the Supreme Court decision would *not* be the basis of their final settlement.¹⁹

What is the significance of the *Manitoba Egg Reference*? I believe the case is typical of the very complicated political and economic conflicts which are the "stuff" of constitutional adjudication. Even more, it suggests the paradoxical character of "government by lawsuit" as the preferred technique for resolving these conflicts. Why do we have the institution of judicial review

¹⁹ In my experience, it is the layman who is most often caught up in the mystique of the theory that whatever a court says is law, and because it is the law it must be obeyed. The following editorial in the Toronto Daily Star about the governmental negotiations relating to the *Manitoba Egg* case is instructive in this regard:

DEFIANCE OF LAW IN CHICKEN WAR.

"An ominous note — at least for any Canadian who hopes for the survival of a united Canada — was struck at the opening yesterday of a conference of four provinces and a federal representative to consider the inter-provincial trade war over chickens and eggs. The conference was held in the wake of a Supreme Court of Canada decision that a Manitoba statute restricting the import of eggs from Quebec was unconstitutional because it dealt with trade between the provinces, a subject reserved to the national government under the British North America Act. Since the Manitoba statute was virtually a carbon copy of the Quebec Act which started the trouble, the judgment obviously renders the Quebec legislation invalid as well. The normal reaction of a provincial government, when confronted with such a court decision, has always been to accept the verdict and abandon the unconstitutional law.

But the present Quebec cabinet is reacting differently. As the conference opened, a Quebec spokesman had this to say. "This meeting will start on the premise that the recent Supreme Court of Canada decision brought about by a Manitoba action is not to be regarded as a guideline for settlement. It is hoped that an agreement can be negotiated amicably that will end any further need for recourse to the courts."

Apparently Quebec means to ignore the Supreme Court decision and go on enforcing its own restrictions on egg imports from other parts of Canada. Apparently it hopes to persuade the other governments taking part in the conference — of Manitoba, Ontario, Nova Scotia and Canada — to do likewise. The argument raised to justify this is that the judgment applies to Manitoba alone because its egg-control regulations are slightly different from Quebec's; but this is a thin excuse, since it was the principle of provincial interference with interprovincial trade, not the fine details, which the court condemned. We trust the other governments at the conference will refuse either to follow Quebec's policy disregarding the Supreme Court decision, or to be drawn into some pact or arrangement to get around it.

In this connection, a particular responsibility rests with the federal cabinet. Prime Minister Trudeau stated last June 29 that he would enforce the Supreme Court's ruling against barriers to inter-provincial trade. Now is the time to carry out that pledge, even if it requires such a drastic and unusual step as disallowance, by the federal government, of any contrary provincial laws."

within Canadian federalism?²⁰ It is not explicitly provided for in the text of the B.N.A. Act and the Confederation Debates do not reveal an explicit agreement that it should be adopted. In fact, the preamble to the B.N.A. Act indicates an intention to establish a constitution similar in principle to that of the United Kingdom. As Dicey was to record shortly thereafter, the basic principle of the British constitution is parliamentary sovereignty and British courts do not have the power to review and invalidate legislation. Perhaps this aspect of the British model was inapplicable to a federal system of divided legislative authority. However, there is no record of an explicit consensus and decision among the Fathers of Confederation that Canadian federalism did require judicial review and there is some indication they believed conflicts of jurisdiction would rarely arise.²¹

Yet judicial review did come to be exercised in Canada immediately after Confederation and encountered so little inquiry or debate that it must have been tacitly assumed by everyone to be proper. An understanding of its legal basis at that time is important for anyone who is assessing the continued viability of the institution one hundred years later. By virtue of the Colonial Laws Validity Act of 1865, which clarified earlier judicial practice, colonial statutes would be void for repugnancy, if they conflicted with Imperial laws extending to the colony. Colonial courts, as well as the Privy Council, has customarily reviewed "subordinate governmental legislation" in the colony and assessed their legal validity in this way. The B.N.A. Act was an Imperial statute extending to the colony of Canada and it explicitly authorized legislative jurisdiction only when it fell within certain "exclusive" areas allocated to either the Dominion or the provinces. When either of these subordinate bodies purported to act beyond the powers created by the British statute, its legislation would conflict with an Imperial law, thus triggering the Colonial Laws Validity Act. Hence, a private citizen affected by any Canadian law could always impugn the validity of these laws by persuading a court that it was inconsistent with the superior Imperial law, which the court was duty-bound to consider in deciding the instant case.

It is because of this legal background that Canadian constitutional theory has never enjoyed a debate, similar to that in the United States since *Marbury v. Madison*,²² about the propriety of judicial review of legislative action. There is no logical necessity about judicial review in a federal system, even though federalism of its very nature involves the creation of *limited* legislative powers. A further inference is still necessary to show that the ordinary courts have the final "say" in determining whether legislation duly enacted by a representative body is *ultra vires* and thus null and void. Indeed, there was explicit provision in the B.N.A. Act for a political forum as a possible vehicle for enforcing the federal limitations. This was the provision for dominion disallowance of dominion statutes. However, the constitutional conventions of the British Empire in 1867 prevented the question even from arising in the

²⁰ Probably the best recent treatment of the origins of judicial review under the B.N.A. Act is Strayer, *supra*, note 6, ch. 1.

²¹ See the comment of Sir John A. MacDonald, quoted in Strayer, *supra*, note 6 at 15-16.

²² (1803), 5 U.S. 137.

Canadian legal environment as to whether the existence of an explicit, political avenue for review excluded the implicit, judicial alternative.²³

Given this fundamental assumption about the legal rationale of judicial review, certain further implications seemed natural. The first corollary is that any ordinary citizen who is affected by the operation of allegedly invalid statutes should have *standing* to require that the Court adjudicate upon his claim to unconstitutionality. If a statute is sought to be applied to him, he should be able to impugn the validity of the statute by appealing to the more fundamental law defining the competence of the enacting body. A second corollary deals with the question of whether constitutional powers are *exclusive* or *concurrent*. The notion that there is a basic law setting out spheres of legislative jurisdiction suggests strongly that the courts may hold legislation invalid because it encroaches on the constitutional authority of another jurisdiction, even where the latter has not passed inconsistent legislation, or perhaps had not occupied any part of the field at all. What if the competent legislatures have not only refrained from exercising their *exclusive* powers but have also granted permission to the other legislatures to act as they did? A third logical corollary of the constitutionality of judicial review in classical federalism is that such delegation is impossible. It offends against the principle that the basic constitutional law is the source of a limited and subordinate authority in the legislatures, and they are not entitled, even by mutual agreement, to amend the original legal scheme which belongs to the people (or at least to their surrogate, the courts).

This view of the source of judicial review within our federal constitution and its legal corollaries is internally coherent and was originally plausible. I suggest, though, that later developments have lessened considerably the case which can be made in defence of judicial review at the same time as the institution has become even more solidly entrenched.²⁴

In fact, the course of events in Canada may be symptomatic of logical tendencies in any federal system.²⁵ In the first place, why are federal unions created? The reason is that the constituent units face the need for merger — usually because of an external threat — but cannot accept total legislative unity. Political, economic, social and cultural concerns are simply too divisive. Hence the constitution-makers strike a political compromise and divide up the various governmental functions in a way which best serves these opposing interests in unity and diversity.

At the time of the merger there is great appeal in the view that the written bargain is really a fundamental law, and that it has a sufficient core of legal

²³ "The constitutional law of the Empire in 1867 apparently embraced the convention that where legislative powers were granted subject to limitations the courts would enforce these limitations. The B.N.A. Act was drafted and enacted in this context". Strayer, *supra*, note 6 at 8.

²⁴ The Statute of Westminster (1931) which removed from Canadian legislatures the basic disability of the Colonial Laws Validity Act, had to make an explicit exception (by Sec. 7(1), (3)) for the British North America Act's distributing legislative power in order to preserve the legal basis for judicial review.

²⁵ An excellent study in the comparative politics of federalism is W. H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964).

meaning to be left to the administration of the ordinary courts, even at the behest of the private individual. Why is this so? First, the negotiators of the federal union have been able to canvass the governmental functions which are important at that time, and to reach a decision about the body to which they are to be allocated. The language which is used to describe these functions is likely to be fairly accurate, and in any event, there is a sufficient substratum of common understanding and practice to admit of coherent and objective interpretation even in the difficult marginal cases. Secondly, the very reasons for the creation of a federal (and only a federal) union in the first place require an impartial arbiter to administer these controls. The original federal bargain reflected important and divisive interests in allocating some functions to the central government while protecting local autonomy with respect to other legislative activities. These needs continue to be deeply felt during the time that the institutions of the new federal union develop authority and support, and an impartial arbiter is a necessary source of assurance that the original bargain is being adhered to.

Each of these conditions for the "law-like" character of a federal constitution gradually erodes as the document ages. There are two related reasons for this tendency: first, social change eventually renders most of the original federal bargain outmoded; secondly, a constitution of its very nature is difficult to amend. There are several kinds of changes which are relevant to a federal constitution. The original functions which were explicitly allocated by the draftsman substantially change their character in ways which are significant to their proper distribution.²⁶ New social problems arise and demand legislative responses which were not foreseen by the draftsman, and thus must be dealt with in terms of the residuary clauses in the constitution.²⁷ The governmental units themselves change their character and capacities for legislative action, both positively and negatively.²⁸ Fundamental values in society change so that the principles which shaped the original federal bargain are altered.²⁹ The cumulative result of all these tendencies is that, to the largest area of constitutional decision-making, the original written understanding becomes simply irrelevant to the real human and social issues with which governments must deal.

On the other hand, as I have said, amendment of a federal constitution is necessarily difficult, and the Canadian experience certainly verifies this.³⁰

²⁶ A good example in this category is the growth of the rehabilitative ideal in the criminal law, which gave rise to the difficult problem of the constitutionality of the federal Juvenile Delinquents Act, R.S.C. 1970, c. J-3 in *A.-G. of B.C. v. Smith*, [1967] S.C.R. 702.

²⁷ An illustration of this category is the device of orderly marketing of farm products, which has been the subject of the cases discussed earlier, culminating in the *Manitoba Egg Reference*.

²⁸ One can contrast the move of Quebec into the international arena with the problems of a tiny province like Prince Edward Island in the modern world.

²⁹ Among these important new values I would include the equalization of social security protections in different regions, the nationalization of basic freedoms, and the trend toward positive economic (as well as the older cultural) activity of the French-Canadian majority in Quebec.

³⁰ There have been only three explicit amendments to the distribution of legislative power under the B.N.A. Act in over one hundred years, and these occurred only with respect to the ambit of Dominion power over social security.

There are a number of parties to the bargain, they have important conflicts of interest, and conventionally now they must unanimously agree on any explicit change. Not only is it politically difficult to secure constitutional amendments, but the perception of this difficulty exacerbates the problem. If everyone knows that an amendment is, practically speaking, almost irrevocable, it becomes much more difficult to persuade a jurisdiction to concede certain constitutional powers for immediate reasons, when the long-term significance of the change is necessarily unforeseeable. Finally, the longer the document remains unchanged, the easier it is for those who are opposed to specific amendments to appeal to the constitution's symbolic and tradition-laden character.

In such a legal situation, it is not defensible for a court to say that its only function is to apply the "law" as it is written and, if the proper authorities do not amend the constitution to keep it in tune with changes in society, the resultant misfit is not the responsibility of the judges. This attitude is founded on the pseudo-positivist assumption that the "law" inheres in the conventional linguistic meaning of the words used in a document and remains "there" unaltered, waiting to be applied by a later judge whatever be the changes in the social context into which he is to insert it. On the contrary, I believe it is impossible to separate the meaning of a legal proposition from the context of the procedure in which it was originally enacted, the demands of the situation within which it was created, and the purposes or intentions of those who drafted it.³¹ Only by reference to these elements does a judge arrive at a meaningful interpretation of the content of the rules which he is legitimately required to administer. As this content recedes into insignificance because of the growing dichotomy between the frozen constitutional language and the rapidly changing society, a court inevitably begins to elaborate a new constitutional law in the course of adjudicating about novel and unforeseen problems. This is the objective import of the court's work, even though judges may disguise their responsibility — either from themselves or from others — through adoption of a very abstract and legalistic reasoning style.

The major thrust of constitutional literature in Canada in the last thirty years or so has been built on this insight into judicial responsibility for constitutional innovation. Writers have been concerned not only to describe the nature and extent of judicial alteration of our federal structure but also to articulate the factors which *ought* to influence the court in allocating legislative power to one jurisdiction or another. As Professor Lederman has so aptly put it, constitutional cases require the court to answer the question, "Who is the better physician [for a social problem] — the Dominion or Provincial governments?"³² What triggered this appreciation of the true nature of constitutional decision-making was a series of unfortunate judicial decisions in the inter-war period, more than a half century after the birth of the Canadian constitution.

³¹ "A word is not a crystal, transportation and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the times in which it is used." Mr. Justice Holmes in *Towne v. Eisner* (1918), 245 U.S. 418 at 425.

³² Lederman, *Thoughts on Reform of the Supreme Court of Canada* (1970), 8 Alta. L. Rev. 1 at 4.

These cases dealt with challenges to some radically different legislative schemes, which were not within the experience of those who were drafting the specific categories of the B.N.A. Act, and thus had to be classified by the Court in terms of the general or residual clauses of the document. Not only did this process place more onerous technical demands on the court than it had been accustomed to in its earlier period of more genuine interpretation but it graphically showed how the process of federal allocation can be distorted by judicial lack of familiarity with, or sympathy for, the policies imbedded in new statutes.³³ In any event, the courts produced a series of decisions whose total impact was a constitutional straitjacket that prevented an adequate political response to Canadian social needs. There was a strong consensus among constitutional writers that these cases had to be either over-ruled or ignored. Yet this meant that in the very areas where judicial review was faced with vital and controversial issues, the growing legal inadequacy of the constitutional document was not remedied by the articulation of stable judicial authorities and principles. However, the recognition of judicial responsibility for constitutional choices, and the hope for new directions in constitutional policy, led to the call for final appellate authority in the Supreme Court of Canada. The expectation was that a Canadian court, composed of Canadian judges, might produce a higher quality of judicial adaptation to social change—especially since these judges would have to live in the same society whose political institutions they were helping to mould.

A second theme in our constitutional literature has now emerged and is founded on this frank recognition of judicial responsibility for constitutional change. The natural question to ask is whether our courts—especially the Supreme Court of Canada—are institutionally equipped to make the judgments required for rational policy-making. It is easy to see why lawyers are attracted to the notion of constitutional reform through judicial change. It is *legally* possible to assert that the court is merely engaged in adjudication of new situations, that the decisions are available as of right and are authoritative, and that changes can be spaced out in an orderly and incremental way. Yet real difficulties emerge as the courts try to perform the task and we begin to realize that they are performing it. Recognition of these difficulties has led to important recent proposals for the redesign of the Supreme Court to improve its constitutional performance.

Our first concern may be with the quality of judge-made constitutional policy. There are two important requirements for intelligent policy-making: the decision-maker must be apprised of the relevant data, and he must have the kind of background and expertise which enables him to assess the data intelligently. The adversary process of adjudication, though it may be an apt instrument for developing a true picture of a specific event, is hardly the way to portray the complex and ambiguous character of a changing Canadian society in a way relevant to the demands of federalism. If a constitutional issue is raised collaterally in actual litigation, the judge gets some idea of how his decision will affect real-life relationships but there is a great risk that this picture will be biased by the fact that he sees only the abnormal case that went

³³ A fine study of the constitutional performance of the courts in this era is Mallory, *Social Credit and the Federal Power* (1954).

to court. In a reference case, he is saved from this danger, but only at the expense of being completely lost in an abstract judicial world.

Nor can we seek the answer in judicial notice of the relevant facts by wise and statesmanlike men appointed to the Court. Judges are recruited from a very narrow stratum of society — middle-aged and respectable lawyers — a practice which is justified on the ground that we want courts to adjudicate specific disputes within a framework of law. It is only by accident that men picked for this purpose will be able to perform the special and rather esoteric function of federalism (which, after all, is only a small percentage of the court's decision-making function.) Nor are they likely to become educated in the realities and necessities of government in a federation by the haphazard and accidental character of the litigation which happens to move them into action.

Various structural changes have been suggested.³⁴ One is the deletion or downgrading of the private law function of the Supreme Court. This would supposedly free the Court for further exposure to and education in the policy-laden questions of public law. It might also justify the appointment of people without an emphasis on narrow legal expertise. It has also been suggested that use of extrinsic aids (such as Brandeis briefs) will enhance the judges' appreciation of the relevant alternatives and better enable the Court to judge between them. Perhaps the most fundamental revision advocated in this direction is the removal of constitutional decision-making from the ordinary courts of law, and the creation of a specialized constitutional tribunal. The tribunal could be composed of non-lawyers as well as lawyers, and presumably could also be equipped for and charged with the task of making independent investigations of the direction in which Canadian constitutionalism should proceed.

Before assessing these proposals, I would first trace the other line of criticism of the present structure of the Supreme Court and show how it connects up also with the suggestion of a constitutional court. It is not enough that constitutional decisions be well researched and reasoned, and be produced by our constitutional experts. The apparent surface authority of our law and of legal decisions depends on a broad-based consensus about the legitimacy of the body which produces them. Absent such a consensus and it will not be long before the losers will be loath to accept voluntarily the decisions that go against them. Unfortunately, when judicial responsibility for constitutional innovation is made evident, and commendably so, its legitimacy must soon come into question. It is one thing to justify judicial review on the grounds that there is a supreme law, agreed upon at the founding of the nation, which

³⁴ Important contributions to the literature about the design of the Supreme Court include: Abel, *The Role of the Supreme Court in Private Law Cases* (1965), 4 *Alta. L. Rev.* 35; Morin, *A Constitutional Court for Canada* (1965), 43 *Can. Bar Rev.* 545; LeDain, *Concerning the Proposed Constitutional and Civil Law Specialization at the Supreme Court Level* (1967), *Revue Juridique Thémis* 107; Strayer, *supra*, note 5; Russell, *The Jurisdiction of the Supreme Court* (1968), 6 *Osgoode Hall Law Journal* 1; Russell, *Constitutional Reform of the Canadian Judiciary* (1968-69), 7 *Alta. Law Rev.* 103; Morin, *Le Québec et l'Arbitrage Constitutionnel* (1967), 45 *Can. Bar Rev.* 608; McWhinney, "A Supreme Court in a Bicultural Society" in *Ontario Advisory Committee on Confederation* (1967).

must be applied by the Courts in evaluating the legality of the enactments which these subordinate institutions have produced. It is quite another thing to justify judicial review when it is seen for what it really is — a continuous process of constitutional development and evaluation which is used by the courts to strike down legislation enacted by the democratic and representative institutions in our society.

The reason why continual judicial innovation is necessary is that constitutional amendment is so difficult to achieve. The reason why constitutional amendment is so difficult is that any revision of legislative authority involves vital, unforeseeable, and almost irrevocable alterations of political power. As a result, the interested parties can rarely agree on explicit changes. Yet, if this is the nature of constitutional amendments, it is difficult to see why such changes will be any more acceptable when they are unilaterally implemented by the Courts. The only way that political institutions can live with this possibility, once they perceive its existence, is to attempt to gain control over the court which is making the decisions.

Within this perspective the Supreme Court of Canada exhibits a basic flaw. The source of an umpire's authority is his impartiality, which assumes his lack of special dependence on any one side. However, the members of the present Court are all picked by the federal government which has an unfettered discretion in evaluating their competence and attitudes. Moreover, the Constitution does not guarantee the status of either the Court or its members after they are selected. Instead, the judges are all paid and protected in their tenure under a statute which is within the sole legislative authority of the federal parliament. Legally speaking, the impartiality of the umpire of federalism may be said to exist at the sufferance of one side to these disputes. It has been the contribution of French-Canadian analysis since the Tremblay Report to point this out and to call for the necessary changes. Those who favour a fundamentally different "constitutional court" propose that such a body should have a constitutionally entrenched status and tenure and that its members should be selected proportionately by both the federal and provincial governments.

Let me summarize this very simplified sketch of the intellectual history of judicial review in Canada. Judicial review was originally justified in terms of the duty of the ordinary courts to apply *all* the relevant law in the adjudication of concrete disputes in Canada. In particular this required measuring the subordinate Canadian statute against the terms of the more basic British law which had legally created the limited law-making powers in the first place. After a period of time (fifty years or so) social and political changes rendered the specific sections of the frozen constitution largely obsolete, and the courts were required to base their decisions on the vague residuary clauses. Criticism of the content of these decisions, and the constitutional strait jacket which they appeared to place on the Canadian political structure, led to a call for a much less legalistic and more policy-oriented view of the judicial function in Canadian federalism. It was not long, though, before it was recognized that the Supreme Court of Canada — designed as it was for the job of adjudication — was not really capable of meeting the demands of constitutional policy-making. Yet, as the proposal emerged for the redesign of the Court for the

better performance of its constitutional function, the institution which finally emerges as ideal is a body which is not really a court at all.

In the course of this sustained intellectual critique of judicial review — of the way it is and should be carried on — the one question which is never asked is the most fundamental of all. Should we continue to have any judicial review at all in Canadian federalism?³⁵ As I have said, the original rationale for review was in terms of the ordinary courts applying a law. However, the contemporary reality, as reflected in the *Manitoba Reference*, is that there is no longer a meaningful law to apply and the present function of federal umpiring appears unsuited for the adversary process of the ordinary courts. If I may put the matter a little more bluntly than did Mr. Justice Hughes, current judicial review in the Supreme Court of Canada means that the Court is holding legislation valid or invalid on the basis of standards which it is making up as it goes along. If this is indeed true, we must seriously ponder whether our constitutional structure has outgrown the role of judicial umpire.

Obviously I cannot demonstrate my thesis about the lack of law in Canadian federalism decisions from one case and I cannot in this lecture document my view that the *Manitoba Reference* is a typical example.³⁶ However, my review of all the constitutional cases in the Supreme Court of Canada since 1949 has suggested two pronounced trends. First, the substantive direction of the Court's constitutional policy is in favour of a gradual and sensible widening of the ambit for legislative action. This is particularly the case for the federal Parliament which the Court — in deed though not in word — no longer attempts to restrict in any significant way. As regards the provincial legislatures, while the trend has been less marked, there has been a relaxation of judicial control in the sixties. The Court still intervenes occasionally — if only to remind everyone that it still has the last word.

The cases in which the Court does intervene and tries to draw a negative constitutional line, exhibit the second pronounced trend. This is the Court's inability to articulate any general principle which shows why some provincial statutes are valid and others are not. For example, the Supreme Court simply did not apply to the facts of the *Manitoba Reference* any legal standard which could fairly be said to have controlled the decision in *Carnation Milk*,³⁷ though the legal and functional problems presented by the cases are very similar. I am no great admirer of the reasoning style of the Supreme Court of Canada and its continued failure to articulate legal rules and distinctions. However, I do believe there is something about the subject-matter itself which

³⁵ I have found only two sustained analyses of this basic question in the Canadian literature: Clokie, *Judicial Review, Federalism, and the Canadian Constitution* (1942), 8 Can. Journal of Economics and Political Science 537; Mallory, *The Courts and the Sovereignty of the Canadian Parliament* (1944), 10 Can. Journal of Economics and Political Science 165.

³⁶ I have attempted to do so in an article reviewing all the federalism cases in the Supreme Court of Canada since 1950, which will appear in a forthcoming issue of the *University of Toronto Law Journal*.

³⁷ These cases deal with state legislation placing allegedly unconstitutional burdens on state commerce. See Benson, *supra*, note 18, Part 3. A typical critical comment about the Court's inability to articulate any viable legal standards is in Freund, *The Supreme Court of the United States* (Cleveland, World Pub. Co., 1961) at 99-100.

accounts for much of the inadequacy of our constitutional opinions. For example, the Supreme Court of the United States in this same area of federalism also no longer tries to restrict the national government and even its admirers are unimpressed by the reasoning in the few opinions which still try to control the statutes. When a court is working with a document which is at least a century old, which cannot be amended to deal with completely new legislative issues, and is required to allocate political power to one question-begging verbal category or another, how does it justify its conclusion? It is easy to support a conclusion in favour of the validity of immediate legislation because it is invariably the case that each jurisdiction has some legitimate reasons for acting in the area. However if one seeks to invalidate challenged legislation on the grounds that the other jurisdiction has a compelling claim to exclusive control, what standards or principles are available which can resolve the essentially political controversy?³⁸ To the outsider, constitutional adjudication resembles nothing so much as compulsory, interest-dispute, labour arbitration, and is equally devoid of legal standards.

The analogy with compulsory arbitration is instructive. Ordinarily, if an issue is politically charged and there are no established legal standards which are applicable to it, we do not believe it can be satisfactorily resolved by an adjudicative body such as a court (or an arbitration board.) Yet sometimes the political (or bargaining) process is not a viable alternative and judicial intervention is better than nothing.³⁹ I do believe that federalism cases (such as the *Manitoba Reference*) involve essentially non-legal conflicts which will not be dealt with very successfully in the judicial process, and thus courts should avoid the area unless their intervention is absolutely vital. I must still address the question whether a federal system — in particular, Canadian federalism — really does need a judicial umpire to survive in an acceptable way.

The lawyer's natural response is, "of course, we need a federal umpire because how else will we resolve conflicts between different governments, when each believes it has a distinctive legislative claim in a particular area?" One of the most basic tenets of the lawyer's ideology is that where there is conflict, there must be a neutral and authoritative body — preferably a court — which can render a decision to resolve the conflict. If there is no procedure for making binding decisions about disputed issues and thus enforcing the rules against those who are tempted to non-compliance, one may wonder how the legal system or any part of it could long survive. Yet further reflection should suggest that law without judges — in particular, federalism without an umpire — is at least possible, if not probable and desirable. Who has not

³⁸ An apt recent example is the controversy about provincial control of cable television, especially in the educational or cultural sphere. The legal background is reviewed in Atkey, "The Provincial Interest in Broadcasting under the Canadian Constitution" in *The Confederation Challenge*, Vol. 2 (1970). The responsible minister in Quebec, Jean-Paul L'Allier, has indicated that he would not feel bound by a Supreme Court adjudication in this novel and murky area. (See *Toronto Globe and Mail*, November 27, 1971, at 10).

³⁹ Administration of a Bill of Rights may be an example, especially in certain areas such as due process. I am analyzing this issue in depth in another article, and mention it here to make clear that I do not feel restriction of judicial review in the sphere of federalism is inconsistent with the expansion of the judicial role in protecting civil liberties.

played in a game which has successfully been carried on within the rules but in the absence of an umpire? Further, the plausibility of the role of the court as an umpire of our federal rules must be substantially lessened when we fully appreciate the fact that the court is developing the rules of the game as it goes along. Constitutional conflict is not always so bad and, even when it is, I doubt that judicial review can make a durable contribution to its resolution.

Instead, it seems to me that a federal system is precisely the kind of relationship for which an external umpire may not be necessary and in which the better technique for managing conflict is continual negotiation and political compromise. In fact, Canadian federalism exhibits many of the conditions which are highly conducive to bargaining. There is a small number of governments; they are constantly talking to each other; they are dependent on each other's co-operation in many different areas; there is always room for trading in new or recurring problem areas, and they are quite capable of spending the time and energy to formulate a compromise. Occasionally, perhaps, an issue may arise in which compromise appears impossible because neither side can make any concession from its vital interests. However, this is precisely the area where unilateral imposition of a settlement by an unresponsive body such as the Supreme Court will be equally unacceptable. It will require the further techniques of political bargaining to secure the effective implementation of the judicial decision in any event.

It is sometimes suggested that, in the more typical and less critical issues which might be resolved by compromise, the process of bargaining will be enhanced by the presence in the background of a neutral umpire who could provide an authoritative ruling in the case of disagreement. If the experience in the labour area is any indication the contrary is true and there is a real possibility that the availability of the judicial alternative may actually hinder the achievement of more functional solutions through compromise. The aura which surrounds courts tends to convert real but limited conflicts of *interest* into an artificial controversy over basic *principles*. Adjudicative responses to a dispute ordinarily speak of absolute legal rights — enjoyed by one party and not the other — rather than recognizing each has political claims of varying weight. Negotiations are usually more productive in an atmosphere where somewhat ambiguous claims may be gracefully conceded, one in return for another, rather than one side having to give up its rights which are guaranteed it by the court.⁴⁰

Hence, I suggest that as lawyers we must take a new view of the process of constitutional policy-making, a view which emphasizes the political character of these issues and their awkward fit with adjudication. There is good reason to believe that the original participants of Confederation assumed a high degree of political interdependence which would deal with federal conflicts through these resources, and the tacit assumption that judicial review was merely residual. The legalistic cost to Canadian constitutionalism may have

⁴⁰ For this reason, it is particularly unfortunate that matters are referred to the courts for a "legal" decision in the midst of ongoing negotiations. A classic example of this is the *Offshore Oil Reference*, [1967] S.C.R. 792, which is criticized in McWhinney, *Federal Supreme Courts and Constitutional Review* (1967), 45 Can. Bar Rev. 578 at 599-600.

been appropriate in our earlier years as a nation. However, both the federal and provincial governments have matured along with the rest of our society to an extent that makes the categories of exclusive, self-contained legislative functions no longer tenable. We must allow the representative governments to decide not only whether affirmative legislative action is desirable for a social problem but also whether it is the appropriate body to enact such legislation. The court should not have the job of making the latter, equally political, decision.

It is no doubt possible, even likely, that both the federal and provincial governments would decide that they should act and that joint occupancy of the field would be awkward. However, this is a reason why the two competing jurisdictions should negotiate a solution whereby one agrees to retreat and let the other have full sway. Such arrangements would be devised by reference to guidelines drawn from earlier patterns of legislative behaviour, reciprocal concessions, threats of sanctions, and the usual paraphernalia of political (or other) bargaining and compromise. It is true that sometimes a governmental consensus may not emerge and citizens who are subject to two sets of laws with somewhat uncoordinated policies will find this rather uncomfortable. What should be the role of our courts in this situation and how is it relevant to my main proposal? First of all, it is a minimum demand on a legal system — if not of its logic, at least of its “internal morality” — that citizens not be subjected to contradictory laws, and courts must have the power to refine the administration of the legal order to prevent this situation arising. Even in a unitary legal system, there are potential cases of legal conflict because of the existence of multiple decision-makers in any complex society. The courts in such a society are required to play the narrower (though still vital) judicial role of interpretation of the relevant statutes to avoid legal conflicts and then application of doctrines of paramountcy to resolve the few remaining situations of unavoidably contradictory legal rules. Undoubtedly the courts in a federal system must also perform this function and no doubt it will arise even more often because of the very nature of federalism.

On the other hand, I do realize the possibility that the courts can become almost as involved in the politics of federalism, through the apparently more limited vehicle of paramountcy than they would be when assessing the validity of laws enacted under exclusive legislative powers. The corollary of my general thesis about the role of courts in a federal system is that the scope of judicial action in this sphere should be confined to the same range as in a unitary legal system. Where a court sees that there are two statutes apparently relevant to one factual situation, it must first interpret the meaning of the statutes to see whether each is really applicable. Only if this results in an inescapable contradiction of legal directives, should the court proceed to hold one of these to be inoperative.⁴¹

⁴¹ My review of the federalism cases in the Supreme Court in the last 20 years suggest that this happens only rarely, as it did in *A.-G. of British Columbia v. Smith*, [1967] S.C.R. 702, and *A.-G. of Ontario v. Policy Holders of Wentworth Insurance Company et al.*, [1969] S.C.R. 779. The extent to which the courts can use interpretation to avoid apparent conflict is well-illustrated in cases such as *Re Validity of Sec. 92(4), Vehicles Act, 1957 (Sask.)*, [1958] S.C.R. 910, and *Fawcett v. A.-G. of Ontario and A.-G. of Canada*, [1964] S.C.R. 625.

An appropriately restricted judicial role would not allow for the application of vague doctrines of "occupying the field" or "pre-emption" to find "implied" conflicts when two legislatures have each tried to deal with the same problem.⁴²

Where the solutions adopted by the two legislatures are not legally contradictory then, even though the court believes the legislative policies to be somewhat incompatible, it should leave it to the legislatures to take responsibility for creating an explicit conflict and thus invoking the doctrines of paramountcy (and facing the electorate for the results, whatever they may be.) The only possible exception to this logic might be the case of provincial laws burdening inter-provincial trade, and thus harming the economic interests of the citizens in other provinces to whom the legislating province is not electorally responsible. My own view is that the only limitation on provincial laws in this area should be a prohibition on discrimination against extra-provincial citizens or products. Absent a finding of such discrimination, the federal government should have the exclusive jurisdiction to decide that provincial laws are an undue interference with the national market.⁴³

The key remaining question concerns the content of the paramountcy doctrines which should be adopted in a federal system where the role of the courts is to be minimized. The natural conclusion is that there should be one easily applicable rule, singling out one jurisdiction's legislation as dominant. There seems also no doubt that, if such is the character of the rule, the dominant jurisdiction must be the Dominion Parliament, which is responsive to the whole electorate, including voters in the province whose legislation is being overridden. The argument will be made, of course, that this gives the national government the legal power to erode the federal system through a gradual process of self-aggrandizement. My response is that legal possibility does not equal political feasibility and that we can and must rely on the political constraints of the federal system to ensure that this does not happen.⁴⁴

How effective is the political process likely to be as an alternative to judicial review in resolving lack of co-ordination in legislative regulation? I believe that one of the reasons why we may be reluctant to trust the political agencies to do this job is the very existence of judicial review as an alternative and ultimately authoritative decision-maker. This has diverted our attention from the need to devise machinery which can do this job. However, there are important lessons to be learned from two areas of Canadian federalism where judicial review is almost completely non-existent: (i) control of the economy through monetary and fiscal policies; (ii) the provision of services, social security, welfare, etc. Here we have no set of legal rules dividing up the exercise of governmental power, administered and enforced by the courts from the outside. Instead, there is the superficially "messy" situation of freedom for experiment and initiative which often gives

⁴² These American or Australian doctrines have not found favour in Canada, as the Supreme Court decision in *Mann v. The Queen*, [1966] S.C.R. 238 illustrates.

⁴³ This is essentially the position of Mr. Justice Black in the United States Supreme Court; see discussion in Benson, *supra*, note 18.

⁴⁴ See Wechsler, *The Political Safeguards of Federalism* (1954), 54 Columbia L. Rev. 543.

rise to conflicts of policy. However, as a result, a conventional framework has been developed within the federal constitution to co-ordinate the concrete policies as they are developed. This seems a much more fruitful exercise than attempting to define exclusive, abstract, and permanent areas of governmental jurisdictions.⁴⁵ There is no reason to suppose that, with the withdrawal of judicial review from the field, the same process would not be repeated in the sphere of legal regulation. In fact, I believe that we are much more likely to achieve a satisfactory atmosphere for consensus if we are striving merely for agreements, which can be altered or revoked, rather than an over-all Agreement, which is constitutionally frozen.

My concluding remarks must bring this discussion back somewhat closer to the reality of the Twentieth Century in Canada. I certainly do not believe this proposal for the abolition of judicial review will be implemented for a long time, if ever. The primary point of my analysis though, is to provide a framework for consideration of current discussion about the procedures for constitutional decision-making — especially the proposal for a constitutional court. The real issue now is not whether we should have judicial review or not, but rather how much of it should we have and how it should be carried on. In my view, abolition of judicial review is the ideal, but I am more concerned with immediate practical steps towards minimizing either the incidence or the harm from review. Instead of trying to alter the Supreme Court in ways designed to make it a better constitutional umpire, let us try to reduce as much as possible the significance of this function in its work.

The most important conclusion which is suggested by my analysis is one directed to the Supreme Court itself — the political desirability of judicial restraint in the area of federalism. In fact, in the last twenty years, perhaps for some of the reasons I have suggested, there has been a gradual but marked relaxation of the federal restraints placed by the Court on our legislatures. We can predict some real legislative tests of this new judicial attitude in the next twenty years, especially from some more adventurous regulatory statutes from the federal Parliament. If, as I hope, these statutory innovations are consistently sustained against legislative attack, we might approach very closely the functional abolition of judicial review, and simply through the low-visibility, incremental process of judicial change.

There is one procedural change which would help this judicial retreat, and which might be politically feasible now. It involves a sharp tightening of the law of standing to challenge the constitutional validity of a statute. The implications of what I suggest are graphically illustrated by the recent Supreme Court of Canada decision in the *Bell Telephone* case⁴⁶ (one of the few recent decisions actually holding provincial legislation to be invalid, even in part). Here *Bell Telephone* resisted a government suit for over \$50,000, a levy which was imposed under the Quebec Minimum Wage Act on the grounds that the Act could not constitutionally apply to *Bell Telephone* and its employees because they were within the dominion regulatory jurisdiction under

⁴⁵ See Smiley, "Devices of Adjustment in the Canadian Constitution", *Constitutional Adaptation and Canadian Federalism Since 1945* (Ottawa: Information Canada, 1970), ch. 4.

⁴⁶ *Commission du Salaire v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767.

S. 92 (10). It should be noted that the constitutionality of a direct taxing statute as applied to Bell could not have been attacked, but the legality of this administrative levy depended on the constitutional validity of applying the general scheme of the statute to regulate Bell's minimum wages, maximum hours, etc. The Court accepted the company's constitutional argument and thus rejected the provincial government's monetary action.

In my view, there is something wrong with a legal system which allows a private business to impeach in this way the validity of laws enacted by a representative legislature. The Act had been in existence for a long time and, along with similar employment legislation (such as the Child Labour Act), had been understood to apply to all companies employing people in Quebec. The federal government had not enacted similar social legislation dealing with industries within its own jurisdiction, and there was no evidence that it had ever objected to provincial laws setting such minimum standards for companies such as Bell. Suddenly, because they are faced with a monetary suit, the company raises a legal defence which is not once but twice removed from the legitimate interests it has in the dispute. As a result, the Supreme Court responded with a ruling which created a shadowy enclave of business immunity from provincial regulation.⁴⁷

From the perspective within which I view the role of judicial review in constitutional law, I would propose that we not allow private individuals of their own motion to impeach the validity of statutes on the ground that they infringe the "exclusive" jurisdiction of another legislative body.⁴⁸ (By analogy, we do not allow taxpayers' suits or defences on the grounds of the alleged unconstitutionality of the expenditure of tax revenues.) Hence, I would suggest that we not only require the private citizen to give notice of a constitutional challenge to the offending jurisdiction (as we do now), but that we also require that he obtain consent for this challenge from the Attorney-General of the jurisdiction whose "turf" he is defending. The only time that a private citizen should have a legal claim in his own right to a constitutional decision is when there are two contradictory statutes from contending jurisdictions and he is asking for the minimal judicial decision about paramountcy.

In cases such as *Bell Telephone* where there is no conflicting legislation, it is obvious that the province had a legitimate interest in the substance of its attempted regulation of Bell Telephone, even though we might agree with the Court that the federal interest was more compelling. If the federal government wants to exercise exclusive jurisdiction in this area, then it should either intervene to challenge the constitutionality of the provincial law (or its application) or, better yet, enact its own statute implementing the pattern of

⁴⁷ I might add that the Court had two competing legal precedents and analogies from which to choose, one upholding the application of provincial Workmen's Compensation legislation to these Dominion industries, the other case denying the application of the provincial minimum wage legislation in the Dominion postal service. Rather casually and, I think, incorrectly, the Court opted for the second analogy and held the employment standards statute constitutionally inapplicable to Bell Telephone. The decision is sharply and accurately criticized in Gibson, *Interjurisdictional Immunity in Canadian Federalism* (1969), Can. Bar Rev. 40 at 53-56.

⁴⁸ See Strayer, *supra*, note 6 at 117-20. A recent case refusing to hear a constitutional challenge brought by a taxpayer is *Thorson v. A.-G. of Canada* (2), [1972] 1 O.R. 86.

legislation it prefers. Nor should we be deterred by the predictable response of the lawyers, who will protest that we are depriving the private litigant of his right to a judicial examination of the validity of a statute which might affect his position in a legal dispute. It makes sense to talk of legal rights only when there are meaningful legal rules imposing a legal obligation on one actor, and which we then feel justifies conferring on another the right to enforce the duty.⁴⁹ In my view, though, the process of constitutional decision-making in Canada has outgrown its original legal context, and the Supreme Court is simply engaging in *ad hoc* dispute resolution (as typified in the *Manitoba Reference*). If the best we can hope for from our judicial umpire is a Delphic utterance — valid or invalid — is there really any reason to allow the private litigant to consult the oracle?⁵⁰

Elimination of the power of the private citizen to lodge a unilateral challenge to the validity of a statute on federalism grounds would sharply lessen the incidence of judicial review and resolution of constitutional questions.⁵¹ It would require the creation of much more extensive procedures for inter-governmental consultation in the area of conflicts of regulation. I believe we can assume that the *Coughlin*⁵² case has removed almost all of the significant limitations on the power of governments to agree to alterations of legislative power, at least where administrative agencies are involved (which is the almost invariable case in the area of legal regulation in any event.) If this is true, we can expect much the same *ad hoc* consensual adjustments and arrangements in this area as are found regarding economic policy or social security. This will force the interested governments to face their own responsibilities for the essentially political and technical questions of allocation of government responsibility in such fields as pollution control, wage and price regulation, competitions policy, Canadian economic nationalism, etc. It will enable these decisions to be made in a forum much more conducive to an informed and acceptable resolution of the immediate problem, without undue fear of a "legal" or principled precedent. If access to judicial review is made

⁴⁹ See the analysis of the concept of a legal right in Hart and Sacks, *The Legal Process* (Cambridge, Mass.: 1958) at 114 ff.

⁵⁰ By contrast, Strayer, *supra*, note 6, favours a widening of the use of judicial review to settle federalism disputes, in particular by elimination of standing barriers. His proposals are based on a view of constitutional decision-making which is epitomized in this statement: "A resort to the courts might clarify the legal position, so that attempts at a resolution of such conflicts could at least proceed on an intelligent basis. Otherwise the constitution will be lost sight of in the welter of federal-provincial negotiations constantly in process. Without a clarification of the constitutional position, many of these proceed on a basis of political accommodation: the respective bargaining strength of the parties is measured by popular support, not legal right. In the process, the fundamental values embodied in the constitutional division of powers may be completely overlooked. A return to law is now required."

⁵¹ However, the decline in the importance of judicial review is well underway, even without this change, for reasons sketched in Corry, "Constitutional Trends and Federalism" in Meekison (ed.), *Canadian Federalism: Myth and Reality* (Toronto, London: Methuen, 1968) at 51-64.

⁵² *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569. The dissent in this case is the best authority for the specious distinction the majority were trying to draw from the *Nova Scotia Inter-delegation Reference*, [1951] S.C.R. 31, a decision which apparently is still part of our constitutional "law".

more difficult and an alternative political forum is set up to canvass the issues at the first stage, then many of the questions posed to the Supreme Court since 1949 would never bother a court again. It is even possible that we could become accustomed to the demise of judicial review and it might gradually wither away of its own accord.

In this paper, I have tried to sketch the logic in the evolution of some of the fundamental ideas of Canadian constitutionalism. At the root of any ongoing intellectual discipline there are certain paradigm assumptions which define the direction of enquiry at any one time.⁵³ Ordinarily, the participants in this intellectual enterprise do not focus on and question these assumptions. This is as it should be because no collaborative progress in understanding could ever be accomplished unless there is tentative agreement about the fundamental concepts. After a period of time, though, incongruities and discontinuities in these assumptions begin to make themselves felt in specific problems and their cumulative result begins to dissolve the established consensus. When this occurs, we are ready for the articulation of a new framework for inquiry which can redirect the intellectual search along more satisfying avenues. I believe we are at this stage in our current assessment of the judicial umpiring of the federal system.

As I have said, judicial review originated with the notion that the Canadian constitution — the British North America Act — was an Imperial statute and thus fit for administration in the ordinary courts of law. The logical corollaries of this view were that private citizens had standing to require the court to invalidate subordinate Canadian laws which were beyond the powers of the enacting legislature because they went beyond the limits laid down by this Imperial statute. Moreover, this finding of invalidity could be made by the courts even though the actual recipient of the legislative power had not yet exercised it, because its legislative jurisdiction in the area was not concurrent. In fact, the original donee of this legislative power could not even consent to its exercise by the other jurisdiction through a form of inter-delegation because of the binding and authoritative character of the basic law.

This originally coherent paradigm began to fall apart because the demands of social change for redistribution of political authority could not be reflected in explicit amendments to the constitution. The burden was placed on the courts to make the necessary adjustments and this immediately placed them in a dilemma. Taking one view of the nature of their role, they could adhere to the letter of the original document which would only have the effect of placing a constitutional strait-jacket around our governmental institutions. On a more adequate view of their obligations, they could begin consciously to update the original allocation of legislative authority in the light of current social needs. Unfortunately, this appeared to result in severe pressures on the structure of a judicial process which was designed for the adjudication of disputes within a framework of law.

The discontinuity which is thus apparent in Canadian constitutionalism lies in the incapacity of the institution of the ordinary court to perform the

⁵³ The notion of "paradigm" I have drawn of course from Kuhn, *The Structure of Scientific Revolutions*, a work which is extremely helpful in trying to understand changes in fundamental intellectual assumptions.

function of constitutional innovation and adjustment. When we perceive the discontinuity, it is no longer difficult to discover the reasons for its existence. A statutory enactment which has been effectively frozen for more than a century, but which purports to govern as fluid and politically-charged an area as the allocation of legislative authority, must inevitably lose its legal integrity no matter how wide a view we may take of the nature of law. I have suggested that when we perceive the true character of constitutional decision-making in the courts, at least the corollaries of traditional judicial review must be altered. We should no longer allow private citizens' standing to impeach legislation on the grounds that it has encroached on the exclusive preserve of another legislative body. As far as citizens are concerned, this would leave the constitutional regime with the legal status of "functional concurrency", except in the rare cases of contradictory enactments to which the courts must apply a rule of paramountcy. Moreover, the courts would no longer interfere with legislative power to make ongoing adjustments in the allocation of legislative jurisdiction through various techniques of delegation. Each of these doctrinal changes is based on the recognition that we do not have a system of constitutional law which citizens have a right to have applied to their disputes in court. Rather, we have a political process of adjustment of our governmental institutions to social change. The primary source of such adjustment must be a continuous process of bargaining and compromise and it is the respective governments rather than the private litigants and the courts which must be seen to have the direct interest and responsibility to preserve the integrity of Canadian federalism.

In many respects the "law in action" is not too far removed from these proposals. Private litigants are rarely successful in securing Supreme Court decisions which invalidate legislation (although their theoretical standing to do so has, if anything, been strengthened by the *B.C. Power* case). Functional concurrency appears to be the operative rule at least in the area of penal regulation of private behaviour.⁵⁴ The limitations on legislative inter-delegation after the *Coughlin* case appear to be little more than verbal (if uncontrolled "incorporation by reference" is to be permitted). Nonetheless, judicial review continues to be an ever-present possibility and it appears unquestioned that the courts must remain the final and authoritative umpire in cases where the political institutions do not agree about the allocation of jurisdiction. For the reasons I have given, I would draw the further conclusion that federalism disputes are inherently non-justifiable and, in the absence of meaningful legal standards, the Court should not be asked to intervene in these essentially political disputes.

I would conclude my analysis of the judicial contribution to the future of Canadian federalism by a loose paraphrase of the conclusion to a famous analysis of the courts' contribution to labour relations.⁵⁵ "The federal allocation of legislative authority is an integral part of our system of self-government. When it works well, it does not need the sanction of constitutional law. It is only when the system breaks down that the Court's aid is invoked. But the

⁵⁴ See Leigh, *The Criminal Law Power: A Move Towards Functional Concurrency* (1967), 5 *Alta. Law Rev.* 237.

⁵⁵ Shulman, *Reason, Contract, and Law in Labour Relations* (1955), 68 *Harv. Law Rev.* 999 at 1024.

Supreme Court cannot, by occasional sporadic decisions, restore the parties' continuing relationship and its intervention in such cases may seriously affect the on-going system of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of political disputes, rather than to court actions on the constitution? I suggest that the law stay out — but, mind you, not the lawyers”.

